No. 92-1471

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

THE CELOTEX CORPORATION,
Petitioner,

v.

REUBEN S. POOL, *et al.*,
Respondents.

THE CELOTEX CORPORATION,
Petitioner,

v.

LESSIE L. WILLIAMS, *et al.*,
Respondents.

On Petition For Writ of Certiorari

REPLY BRIEF OF PETITIONER
THE CELOTEX CORPORATION

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respondents' Brief goes to great lengths to avoid discussing why this Court should review the due process issues raised by Petitioner The Celotex Corporation ("Celotex"). Celotex therefore will address only three issues raised by Respondents. First, Celotex will reply to Respondents' suggestion

that Celotex has waived its right to make a procedural due process challenge to the punitive damage award because it did not challenge the punitive award as being excessive in the state courts. Second, Celotex will address why the Texas system of assessing punitive damages violates due process. Third, Celotex will set forth the evidence in support of its argument that multiple punitive damage awards against a single defendant for a single course of conduct violates due process.

CELOTEX DID NOT WAIVE ITS PROCEDURAL DUE PROCESS CHALLENGE

Most of Respondents' Brief in Opposition ("Br. Op.") erroneously argues that Celotex has waived its right to raise a procedural due process challenge to the Texas system of punitive damages because Celotex did not attack the punitive award as being excessive in the state courts. Celotex is aware of no requirement that a party must assert a substantive state law evidentiary challenge in order to preserve a procedural due process claim.

Respondents fail to recognize the fundamental distinction between substance and procedure delineated by this Court:

> The point is straightforward: the Due Process Clause provides that certain substantive rights -- life, liberty, and property -- cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct.

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541 (1985); *see also Harrah Independent School District v. Martin*, 440 U.S. 194, 197 (1979). It is the Texas *procedure* which Celotex challenges in the first question presented in its petition.

Celotex presented its procedural due process challenge at every step of the proceedings. *See* App. at F, 82a-95a; App. at H, 98a-100a; App. at I, 101a-103a; App. at J, 104a-107a. Respondents never objected in the state court system to the way in which Celotex presented its due process challenge to the Texas system of imposing punitive damages or to the way in which Celotex presented its due process challenge to the multiple awards of punitive damages against a single defendant for a single course of conduct. The courts in the state system never defaulted Celotex on any theory of waiver or failure to preserve the constitutional challenges.

Respondents also argue that Celotex's failure to request additional jury instructions on the punitive damage issue is further proof of waiver. The flaw in this argument is that the jury issue was substantially correct under Texas law. The constitutional challenge raised by Celotex is not that the state jury issue was defective, but that the Texas system for punitive damages fails to satisfy the due process requirements recognized in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1991).

TEXAS LAW DOES NOT PLACE MEANINGFUL RESTRAINTS UPON A JURY'S DISCRETION IN AWARDING PUNITIVE DAMAGES

Respondents make the weak effort to argue that the record "in this case" shows that Celotex was provided with all of the due process safeguards constitutionally required. In support of this argument, Respondents can only offer as authority two pages from a brief they filed in Texas Supreme Court (Br. Op. at 16) and three brief quotations from the decision in this case of the Texarkana Court of Appeals (Br. Op. 17-18). Two of those quotations discuss the conduct for which punitive damages were imposed and the third quotation summarily concluded that the record supported the award of punitive damages in relation to the actual damages, the nature of the wrong and "other factors." This is all of the support that Respondents can glean from the record to support their argument that there is some guidance on a jury's discretion to award punitive damages under Texas law. These few meaningless sentences stand in stark contrast to the due process safeguards that existed under Alabama law identified in *Haslip*.

Though Respondents make a passing reference to the decision of the Texas Supreme Court in *Alamo National Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981), they neither attempt to apply those standards to this case themselves nor do they point this Court to anywhere in the record where the state trial judge or the state appellate court tried to analyze the jury verdict in light of any objective factors. The unalterable fact is that Texas law does not require any meaningful post-verdict review of punitive awards and the courts in this case did no such review.

Respondents fail to make any response to those Texas cases which recognize a jury verdict as being conclusive unless it is the result of passion or prejudice, such as *Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712, 714 (Tex. 1987); *Marathon Oil Co. v. Sterner*, 777 S.W.2d 128, 132-133 (Tex. App.--Houston [14th Dist.] 1989, no writ); or *Capital Title Co. v. Donaldson*, 739 S.W.2d 384, 392 (Tex. App.--Houston [1st Dist.] 1987, no writ). Respondents fail to address *State Farm Mutual Automobile Insurance Co. v. Zubiate*, 808 S.W.2d 590 (Tex. App.--El Paso 1991, writ denied), in which the majority opinion could offer no objective criteria for reviewing punitive damage awards and in which the concurring opinion aptly described the Texas punitive damage system as an arbitrary process without any objective standards. Respondents do not address the language in *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1095-96 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1778 (1992), which bemoaned the "inherent problems with the purely subjective Texas rule" for awarding and reviewing punitive damage awards.

The Texas court of appeals upheld this punitive damage award because it could not conclude that the punitive award would "shock the sense of mankind." App. at A, 48a. The Texas cases described above establish that the reality in Texas is that there is virtually unlimited jury discretion in awarding

punitive damages and that the real standards used by Texas courts is a "passion or prejudice" standard.[1]

CELOTEX HAS PROPERLY AND ADEQUATELY PRESENTED ITS DUE PROCESS CHALLENGE TO REPEATED AWARDS OF PUNITIVE DAMAGES

Respondents do not address the merits of Celotex's due process challenge to repeated awards of punitive damages against it for a single course of conduct. Instead, they try to impose three procedural barriers: that the issue has been "foreclosed" by prior denials of certiorari by this Court; that the assessment of punitive damages in this case was related to "specific individual harm"; and that Celotex has not presented this Court with an adequate record in support of its complaints.

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[1] Respondents make reference to the fact that the punitive damages against Garlock in this case were reversed by the Texarkana Court of Appeals. The basis for this ruling was that the evidence was legally insufficient to establish the type of conduct necessary to impose punitive damages. App. at A 55a. Thus, the question of punitive damages against Garlock should never have gone to the jury. The issue raised by this appeal is whether Texas law comports with the due process obligations recognized in *Haslip* once the evidence becomes sufficient to allow the punitive issue to go to the jury. The fact that Respondents failed to produce any evidence that would justify a punitive award against Garlock has no bearing or relevance on whether the Texas system of punitive damages satisfies due process requirements in limiting jury discretion once it has determined that the evidence is sufficient to submit a punitive damage issue to the jury.

First, Respondents refer to *Glasscock v. Armstrong Cork Co.*, 946 F.2d at 1085 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1778 (1992) and *King v. Armstrong World Industries, Inc.*, 906 F.2d 1022 (5th Cir. 1990), *cert. denied sub. nom. Celotex Corp. v. King*, 111 S.Ct. 2236 (1991), to argue that the issues that Celotex raises here have been "foreclosed." Br. Op. 20. The denial of certiorari by this Court does not constitute a ruling on the merits of the claims presented by a certiorari petition. *Teague v. Lane*, 489 U.S. 288, 296 (1989); *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950). In fact, neither the *Glasscock* nor the *King* decision addressed the constitutional challenge to repeated punitive damage awards, but relied upon *Jackson v. Johns- Manville Sales Corp.*, 781 F.2d 394 (5th Cir. 1986), *cert. denied*, 478 U.S. 1022 (1986), which in turn was based solely upon state law.

Second, the punitive damages in this case were based upon the same course of conduct which has been the basis of numerous other punitive damage awards against Celotex. In the trial court, Celotex presented the affidavit of Charles E. Robinson, App. F at 85a-90a, and the affidavit of Thomas W. Taylor, App. F at 92a-95a. Those affidavits establish that as of August 1988, Celotex was a defendant in approximately 65,000 lawsuits seeking recovery for personal injury or wrongful death resulting from exposure to asbestos contained in products manufactured and sold by Celotex or another company, that the cases involve virtually identical claims and evidence and often the same expert witnesses, and that all of the claims arose out of exposure to the same type of products. It is undisputed that all of those many thousands of

lawsuits involve allegations for the same wrongful conduct against Celotex.

Celotex also presented affidavit evidence that it had paid two punitive damage judgments prior to the judgement in this case, that between September 1, 1988 and June 30, 1989, approximately 274 judgments totaling approximately $30,000,000 compensatory damages and approximately $15,000,000 in punitive damages were returned against Celotex in asbestos-related bodily injury cases, that Celotex was a party to approximately 65,000 asbestos-related suits as of August 31, 1988, and that Celotex continued to be named as a defendant in new lawsuits at the rate of 1,600 cases per month, the majority of which contain a claim for punitive damages. Celotex provided the trial court with a list of the punitive damage awards entered against Celotex between October 1, 1988, and April 12, 1989.[2] App. F at 86a - 88a.

Third, it is incorrect for Respondents to suggest that the award of punitive damages in this case was "related to specific individual harm." Br. Op. at 19. There was nothing in the language of the definition of exemplary damages submitted to the jury that so limited the jury's discretion. *See* App. A at 61a. Respondents' counsel argued exactly the opposite in requesting punitive damages, exhorting the jury to award punitive damages for the "thousands" of men that had died from exposure to asbestos- containing products because the defendants manufactured the product and "put it in the marketplace and set [sic] it all over the country." App. K at 108a-109a. The

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[2] Celotex filed a voluntary petition under Chapter 11 of Title 11, U.S.C. on October 12, 1990.

Respondents' jury argument for punitive damages was based on exactly the same conduct that formed the basis of millions of dollars of prior punitive judgments entered against Celotex.

Celotex more than adequately presented the factual evidence in support of its due process challenge to repeated punitive damage awards to the trial court, without objection from Respondents. The issue has been squarely raised and has never before been addressed by this Court. In light of the pending proceeding in *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992), *cert. granted*, 113 S.Ct. 594 (1992), this case presents an ideal opportunity for this Court to address this significant issue.

Respectfully submitted,

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